Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Verizon's Petition for Waiver of the	)	
Commission's Rules to Treat Unrecovered	)	CC Docket No. 95-116
Local Number Portability Costs as Exogenous	)	
Costs under Section 61.45(d)		

COMMENTS OF THE
NEW JERSEY DIVISION OF THE RATE COUNSEL

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I. INTRODUCTION

In response to the Public Notice released on July 11, 2006[1] the State New Jersey Division of Rate Counsel ("Rate Counsel") formerly known as the Ratepayer Advocate,[2]

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[1]/ See Public Notice, DA-06-1434, dated July 11, 2006, establishing pleading cycle with Comments due on July 18, 2006 and reply comments due on July 24, 2006.

[2]/ The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jerseyans who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Christine Todd Whitman's Reorganization Plan. The mission of the Ratepayer Advocate is to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory. In addition, the Ratepayer Advocate works to insure that all consumers are knowledgeable about the choices they have in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (*N.J.S.A.* §§ 52:27EE-1 et seq.). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest," *N.J.S.A.* § 52:"27EE-57, *i.e.*, an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A.§52:27EE-12, and the office of the Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters.

hereby submits its comment regarding the Verizon's petition asking for waiver from Section 61.45(d) of the Federal Communications Commission's ("FCC" or "Commission") rules related to the recovery of local number Portability ("LNP") costs.

In its petition, Verizon asserts that it is similarly situated to AT&T[3] with respect to under-recovery of certain of their carrier-specific local number portability (LNP) implementation costs ("LNP") estimates.[4] Verizon further asserts that like AT&T, it satisfies the Commission's standard for exogenous costs relief and asks the FCC to allow Verizon to waive § 61.45(d) of the FCC's rules so that Verizon can treat as exogenous costs LNP implementation costs which Verizon alleges it has not recovered through the FCC mandated surcharge.[5] Verizon seeks to recover these "costs" from end users via the end user common line charge (EUCL). For reasons set forth below, the Petition for waiver filed by Verizon should be denied.

As an initial matter, the Rate Counsel notes its objection to the short comment cycle on Verizon's filing. The period for comments set by the FCC denies fundamental

[3] / *I/M/O Petition of AT&T Inc. for Waiver of the Commission's Rules to Treat Certain Local Number Portability Costs as Exogenous Costs under Section 61.45(d)* CC Docket No. 95-116, FCC 06-97, Order adopted June 30, 2006 (*rel.* July 10, 2006).

[4] / Verizon's Petition for Waiver of the Commission's Rules to Treat Unrecovered Local Number Portability Costs as Exogenous Costs Under Section 61.45(d), Docket No. 95-116, at 17-18.

[5] / Petition at 4.

due process.[6] As the Rate Counsel noted in AT&T's *Petition for Waiver* the relief sought here by Verizon is barred by the two year statute of limitations set forth in 47 U.S.C. § 415. The five year recovery period ended on January 31, 2004 and therefore, the statute of limitations expired on January 31, 2006. As a matter of law, this precludes any grant of the waiver request. In addition, the requested relief is not warranted under the facts and the law as an exogenous event. The FCC action on setting the recovery mechanism for LNP implementation is rate regulation and not a rate cap form of regulation. As such, the attempt to recover now for the prior under recovery is precluded under the prohibition of retroactive ratemaking. Thereby the Petition should be denied.

II. INTEREST OF THE RATE COUNSEL IN THE INSTANT PROCEEDING.

The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is a Division within the Department of the Public Advocate,[7] that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings.[8] The outcome of the pending Petition affects

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6/ It is worth noting that the FCC allowed an extremely short comment period on the instant petition. The original Public Notice, DA-06-1434, dated July 11, 2006, established a pleading cycle which allocated just five working days for comments, and four working days for reply comments. In addition, Verizon's Petition for Waiver dated June 30, 2006, and originally categorized as filed on June 30, 2006, was not scanned and made publicly available for review on the Commission's Home Page at http://www.fcc.gov./cgb/ecfs, until July 12, 2006. On July 14, 2006, the Commission issued an Erratum to the previously issued Public Notice which corrected the filing date of Verizon's Petition from June 30th to July 6, 2006, and made the initial comment filing date July 21, 2006, with reply comments due by July 25, 2006, which actually only gives parties two working days to submit reply comments. By denying faster access to the documents needed, and by truncating the comment periods the FCC has virtually ensured that very few parties will have the opportunity to comment on the instant petition and has affected commenter's due process rights.

7/ Please see footnote 2.

8/ See New Jersey Reorganization Plan 001-1994, codified at *N.J.S.A.* 13:1D-1, et seq.

the national telecommunications industry and, therefore, the options, quality, and price of telecommunications services offered to consumers throughout the nation, including consumers in New Jersey.

The Rate Counsel recently submitted comments in *I/M/O Petition of AT&T Inc. for Waiver of the Commission's Rules to Treat Certain Local Number Portability Costs as Exogenous Costs under Section 61.45(d)* CC Docket No. 95-116, FCC 06-97, Order adopted June 30, 2006 (rel. July 10, 2006), wherein we opposed the grant of a waiver to AT&T to treat under recovered LNP costs as exogenous costs.

III. THE COMMISSION SHOULD DENY VERIZON'S PETITION

a) Verizon Has Failed To Provide Evidence That It's $100 Million LNP Shortfall Is Properly Recoverable As An Exogenous Cost

The Rate Counsel submits that Verizon has failed to justify, demonstrate and show good cause for the grant of a waiver. Like AT&T, Verizon argues essentially that it failed to recover fully its LNP costs due to factors beyond its control and certain unforeseeable developments. While the Rate Counsel concedes that a carrier may seek exogenous costs adjustments under rate cap regulation for cost increases or decreases for actions outside of the carrier's control, such as a result of a Commission's regulatory actions, Verizon has failed to provide a sufficient link between the mandate pursuant to Section 251(e)(2) of the Act to provide LNP and Verizon's alleged loss of access lines resulting in a $100 million shortfall. The Rate Counsel submits that Verizon's arguments in support of the waiver are baseless. Verizon asserts that as a result of new and unexpected competitors, wireline providers have undergone substantial and immediate losses in terms of number of access lines"…"[T]he number and strength of those changes were not anticipated - … short of a telecommunications crystal ball - …. by any ILEC when Verizon's five-year tariff was adopted.[9]

The Rate Counsel submits that the underlying basis asserted by the FCC for adopting LNP recovery, through a flat rate charge to consumers, the need for competitive neutrality to interexchange carriers ("IXCs") can not be used now to support a course reversal and treat the under recovery as an exogenous event, as if LNP recovery was a rate cap mechanism in the first instance. In addition, the concern over competitive neutrality for IXCs is no longer appropriate. With the two largest IXCs now part of new AT&T and Verizon Communications Inc., there is simply no need for competitive neutrality at this time. Therefore, the FCC may not rely upon competitive neutrality to otherwise justify granting the waiver.

Verizon made an error in judgment as to the impact of the so called "new and unexpected wireline competitors."[10] In fact the record shows that Verizon knew well before the end of the five year recovery period that line counts were declining. Verizon made FCC Form 477 filings through out the five year period which clearly showed access lines were declining. Verizon should not have waited over two (2) years after the recovery period ended to seek relief.

In competitive markets, errors and omissions by a company should fall upon the company and its shareholders not consumers. Verizon simply failed to monitor its cost recovery and take appropriate timely action to remedy the situation. This was not beyond

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[9] / Petition at 10.

[10] / Id, at 10.

Verizon's control or otherwise not foreseeable. Therefore, this does not constitute an exogenous event. As a result, Verizon's Petition should be denied.

b) Verizon's Petition Fails to Provide Detailed Data to Support Its Gross Claimed Figure of $100 Million Shortfall

Although, exogenous events are generally those events that increase or decrease costs that are triggered by administrative, legislative or judicial action beyond the control of carriers. However, the facts show that Verizon simply failed to adequately track its cost recovery during the five-year period and request relief prior to expiration of the five year period. The responsibility for the under recovery rests solely upon Verizon and its officers and shareholders. It is simply improper to shift the responsibility on to ratepayers in the first instant and the attempt to have the shortfall recovered under end users common line ("EUCL") charge. The EUCL is intended to compensate for the cost of the local loop used to provide interstate services. Even if the FCC was correct that the under recovery qualified as an exogenous event – which it can not, then, the recovery should be from interstate access charges. As noted above, the competitive neutrality concerns previously relied upon by the FCC to justify a flat charge to end users has been overtaken by subsequent events, such as the grant of in-region long distance, mergers between IXCs and incumbent local exchange carriers, the separations freeze (which causes under allocation of costs to the interstate jurisdiction) reclassification of VoIP as an interstate service and classification of DSL as an information service.

More importantly, Verizon's Petition is devoid of adequate or sufficient support as to its claim it could not have anticipated line loss due to competition. In fact, Verizon does not even provide a breakdown of alleged un-recovered costs by company or by region. Thus, the Petition lacks allocation data based upon a state by state analysis. The absence of such information raises a concern for New Jersey ratepayers as it should for ratepayers throughout different service regions and states. Assuming the Commission grants Verizon's Petition- which it should not-, ratepayers in regions that experienced small line losses should not in effect help pay for short falls in states where larger line losses occurred. Verizon also overlooks the fact that other incumbent carriers were able to predict and recovery their LNP costs within the five year period. This alone undercuts Verizon's claim that a waiver is appropriate.

The Rate Counsel takes issue with Verizon's statement that "[W]hatever relief the Commission affords AT&T should also be provided to other, similarly situated carriers such as Verizon."[11] Although Verizon would have the Commission assume that it functions under the same set of circumstances as AT&T, Verizon has other issues which the Commission should factor in when making a final decision on this Petition. "Exogenous events" can result in adjustments that increase or decrease rates. As noted above, there have been numerous changes in the telecommunications marketplace. Each of these events can be categorized as an "exogenous event." These other "exogenous events" have impacts and those impacts need to be assessed. To the extent rate reductions should have been implemented, any LNP under recovery may be wiped out. Verizon has provided no data for which this analysis can be made. This justifies the denial of the Petition.

[11] / Petition at 1.

An even more concrete concern is that Verizon has received five (5) waivers related to its price cap filings related to delay in re-integration of its VADI to the Verizon Telephone Companies.[12] Such waivers are "exogenous events" that may result in cost reductions that should be offset against any alleged LNP under recovery. In that regard, the Rate Counsel has filed on July 6, 2006 an application for review related to the *Waiver Order* and its affect on the Verizon's 2006 price cap filing. In that application for review, the Rate Counsel asks the FCC to:

> direct the Bureau to suspend, investigate and issue an accounting *Order* for Verizon's 2006 annual access tariffs filing and initiate an investigation as to whether *exogenous* adjustments are necessary due to the regulatory changes implemented since 2001 and to remedy the error in granting serial waivers, thereby correcting harms to consumers from the grant to Verizon of perpetual waivers have also have resulted in permitting Verizon's request for a waiver of the Commission's price cap rules for services transferred from VADI to telephone companies has had on Verizon's alleged costs.

The VADI waivers along with the other exogenous events may trigger rate reductions that would eliminate or reduce the alleged LNP under recovery. If Verizon is permitted to pursue this waiver, the FCC must direct Verizon to submit data to show the overall effect on rate caps of the VADI waiver and all exogenous events that have occurred subsequent to the LNP Recovery Order. Absent such data, the Petition should be dismissed. The Rate Counsel submits that public interest requires the denial of the Petition.

[12] / *I/M/O Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, WCB/Pricing File No. 06-10, Order adopted June 8, 2006 ("*Waiver Order*").

c) The Grant of a Waiver Would Result in an Impermissible Form of Retroactive Ratemaking

Lastly, the proposed treatment also implicates retroactive adjustments which in turn raise the issue of improper retroactive ratemaking. The grant of a waiver under these circumstances would be no different than a rate of return tariff filing, which clearly would amount to retroactive rate-making, which clearly can not be done. Under the Communications Act of 1934, the Federal Communications Commission is empowered to ensure just and reasonable rates, not rates of return. 47 U.S.C.S. § 201(a). For example, in the context of setting rates for local exchange carriers, "deemed lawful" tariffs are not subject to refunds and refunds thereafter have been held to be impermissible as a form of retroactive ratemaking. *See, ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 at 411.[13] This reasoning is equally applicable in the instant Petition. The waiver would seek to recover under recovery during the tariff period. This is the essence of an improper retroactive rate-making .

The rule against retroactive ratemaking prohibits after the fact recovery of under recoveries or over recoveries. As the Court in *ACS of Anchorage* correctly held, refunds from lawful tariffs are “impermissible as a form of retroactive ratemaking.” at 411.[14]

The Rate Counsel submits that like AT&T, Verizon has not provided any data to support its assertions that the change in the telecommunications market was so

[13]/ *ACS of Anchorage* citing to *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.,* 284 U.S. 370, 290 F.3d 403, 76 L. Ed. 348, 52 S. Ct. 183 (1932).

[14]/ *Virgin Islands Telephone Corp. v. FCC*, ___ F.3d ___ (D.C. Cir. 2006), (citing to *ACS of Anchorage*, *supra.* at 411).

unpredictable that it caused Verizon to overestimate the number of access lines it would have during the five-year recovery period and cause it to under recover its overall LNP costs estimate to justify the grant of a waiver and recovery through increased EUCL charges. The Rate Counsel submits that the requested relief is an impermissible retroactive rate-making. As a result the public interest requires denial of the Petition.

d) Evidence of the Impact of is Barred by the Statute of Limitation

In the alternative, the Rate Counsel submits that Verizon's Petition is barred by the statute of limitations which expired on January 31, 2006. Verizon should have and could have sought a waiver prior to the expiration of the five year period. Verizon's failure in this regard precludes the relief now sought after the end of the five year recovery period. The relief requested is also precluded by the two year statute of limitations contained in 47 U.S.C. § 415. The FCC has imposed as part of Commission proceeding Section 415 to bar recovery for claim outside of its two year statute of limitations. *See Communications Vending Corporation of Arizona, Inc., et al., v. FCC* et al., 365 F. 3d 1064, (D.C. Circuit) 1073-1074.[15]

[15] / *See also, I/M/O AT&T Corp. and AT&T of the Virgin Islands, Inc., v. Virgin Islands Telephone Corporation, D/B/A/ Innovative Telephone, Memorandum & Opinion Order,* File No. EB-04-MD-002, FCC No. 04-195, adopted August 4, 2004; and *Davel Communications, Inc., a Delaware Corporation; Access Anywhere LLC; Kristin Moelle; Automated Telecom Technology Inc., dba A-Tel Inc.; Central Telephone Company: Steve Peterman, dba Colorado Payphones; Communications management Services LLC v. Qwest Corporation, a Colorado Corp.* Appeal from the U.S. District Court for the Western District of Washington, Argued December 8, 2005, Opinion by Judge Berzon filed June 26, 2006, (9th Cir.), No. 04-35677, D.C. No. CV-03-03680-MJP.

IV. VERIZON HAS FAILED TO DEMONSTRATE GOOD CAUSE IN SUPPORT OF A WAIVER OF SECTION 61.45(d)

In general, a waiver request must demonstrate special circumstances warranting a deviation from the general rule, and that such a deviation will serve the public interest.[16] For the reasons discussed above, Verizon has failed to demonstrate good cause to support the relief requested. Ultimately, Verizon's basis for the relief sought is that they made a mistake in judgment and failed to properly monitor and account for LNP cost recovery. Verizon has failed to establish "special circumstances" that warrant deviation from the Commission's general rules. Similarly, while it is true, that Section 61.45(d) as applied to the rate cap regulation permits exogenous costs adjustments for "extraordinary" events, Verizon has failed to demonstrate "extraordinary" circumstances, let alone sufficient "good cause" to permit under recovery of LNP costs. Permitting recovery through EUCL charge based upon granting a waiver and finding an "exogenous event" that is applicable in a price cap regime and using that to permit recovery of under recovery of LNP charge, after having expressly rejected recovery of LNP through price caps in the *LNP Recovery Order*, when the LNP recovery mechanism is a rate of return recovery method is arbitrary, capricious, and an abuse of discretion and constitutes impermissible retroactive ratemaking. Therefore, the Petition should be denied. Lastly, Verizon has failed to demonstrate how waiver of Section 61.45(d) would serve the public interests. For the foregoing reasons, good cause does not exist to grant a waiver of Section 61.45(d).

16/ *Northeast Cellular Telephone Co. v. FCC* 897 F. 2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969)).

V. CONCLUSION

The Commission should not grant Verizon's request for waiver of Section 61.45(d) for under recovery of LNP costs. To grant any relief would improperly compensate and insulate Verizon from its lack of judgment. Ultimately, the grant of any relief would cause ratepayers to pay higher rates to compensate for a business error. Such a result is manifestly unjust to ratepayers and contrary to the public interest. Therefore the Rate Counsel urges that the FCC deny the Petition.

Respectfully submitted,

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